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Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

DOMENIC BUCCELLA,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does a public high school student have an expectation of privacy in his handwriting and student papers that precludes their disclosure to law enforcement officials acting without a warrant?

II. Are a public high school student's school papers protected from disclosure under the Family Education Rights and Privacy Act of 1974?

III. Are a public high school student's school papers "student records" that are entitled to protection under the confidentiality provisions of the regulations of the Commonwealth of Massachusetts?

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (SJC-08270), which appears at 434 Mass. 473, 751 N.E.2d 373 (2001), is reproduced at Appendix A.

Findings of fact of the Brockton District Court for the Commonwealth of Massachusetts, dated September 28, 1999, appear in Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Supreme Judicial Court of Massachusetts is dated July 9, 2001. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATIONS INVOLVED

U.S. Const., Amend. I, U.S. Const., Amend. IV, U.S. Const., Amend. XIV, § 1, 20 U.S.C. § 1232g, 603 Code Mass. Reg. § 23.01, 603 Code Mass. Reg. § 23.02, 603 Code Mass. Reg. § 23.07(4). Relevant portions appear in Appendix D.

STATEMENT OF THE CASE

A. Jurisdiction of the Courts Below

The Supreme Judicial Court of Massachusetts, the Opinion of which is sought to be reviewed in this Petition, had jurisdiction of this matter pursuant to Mass. Ann. Laws ch. 30A, § 15, which provides:

> The supreme judicial court and the appeals court shall have concurrent jurisdiction to review any

> proceedings had, determinations made, and orders or judgments entered in the superior court pursuant to section fourteen. The supreme judicial court or the appeals court, subject to the provisions of section thirteen of chapter two hundred and eleven A, may by rule vary the procedure authorized or required for such review upon a finding that the review by the court will thereby be made more simple, speedy and effective.

The District Court had jurisdiction of this matter pursuant to Mass. Ann. Laws ch. 218, § 26 ("Jurisdiction of Offenses").

B. Facts

1. *Procedural History*

The Petitioner Domenic Buccella was charged with violating the civil rights of one of his teachers and two counts of malicious destruction of property valued at more than $250. All three charges arose from graffiti containing obscenities and racial slurs that was found on school property. The evidence that purported to identify the Petitioner as the perpetrator of these crimes included comparisons of the handwriting in the graffiti with the Petitioner's handwriting in several of his school work papers. At the request of its handwriting expert, the Commonwealth moved to compel the production of witnesses and comprehensive handwriting exemplars for further comparison. The Petitioner filed a motion to suppress the handwriting samples provided by his high school and a motion to dismiss, on the ground that the evidence used to charge him was illegally obtained.

District Court Justice David G. Nagle denied the Commonwealth's motion for production of exemplars and granted the Petitioner's motion to suppress and his motion to dismiss. The court found that neither the Petitioner, a minor, nor his parents ever gave permission to the School Department to turn over any samples of the Petitioner's handwriting to the Police Department. Justice Nagle concluded that the Petitioner

> had an expectation of privacy when submitting his work assignments and tests to the school. Accordingly, the examples submitted to the District Attorney's office from the School Department must be suppressed.

The Commonwealth appealed, and the case was transferred to the Supreme Judicial Court on its own motion.

On appeal, the Supreme Judicial Court held that the Commonwealth's motion for handwriting exemplars should have been allowed and that the Petitioner's motion to dismiss should have been denied. The court vacated the judgments dismissing the complaints and remanded the case to the District Court.

The Petitioner then filed this Petition for Certiorari to this Court.

2. *Facts*

The Petitioner was a student at East Bridgewater High School on September 5, 1997. At that time, he was a special needs student under an accepted Individual Education Plan pursuant to M.G.L.c. 71 and the IDEA 20 U.S.C. § 1400 form

type 502.2 with a profile of impulsive Attention Deficit Hyperactivity Disorder. The Brockton District Court found that the Petitioner, because of his disability, lacked impulse control and needed constant monitoring of his behavior.

On Friday, September 5, 1997, someone wrote racial slurs on the chalkboard of teacher Shirley Phillips' classroom at the high school. Many persons had access to the room over the course of the following weekend. Photographs of the graffiti were taken and shown to the faculty, who were asked whether they could identify the handwriting on the blackboard. None of the faculty were able to identify the handwriting. School officials reported the incident to Detective Michael Kennedy, of the East Bridgewater Police Department, on September 8, 1997. No one was named as a suspect at the time.

More graffiti appeared on the walls of the school on October 16, 1997. The Petitioner became a suspect at that time, along with two or three other students. On October 23, 1997, the last act of vandalism appeared on the walls. The school department advised the police that the Petitioner was a suspect. The record does not disclose why the other students were not also identified as suspects.

In November, 1997, the vice principal provided Detective Kennedy with samples of the Petitioner's handwriting and that of two other suspects, which were acquired as part of an in school investigation that was conducted by the vice principle. These samples were school assignments and tests submitted to class as part of his educational curriculum. Kennedy turned over the handwriting samples to Assistant District Attorney John Bradley in December, 1997.

The District Attorney's office retained handwriting consultant Nancy McCann. After analyzing the Petitioner's handwriting, she concluded that it was the most likely of the three suspects' handwriting. Having consulted with the District Attorney's office, Detective Kennedy decided to file complaints against the Petitioner. The complaints were issued for malicious destruction of property and violation of civil rights.

The Petitioner filed a motion to suppress the handwriting analyses and samples, on the ground that his school papers containing the samples had been illegally obtained by the East Bridgewater Police Department. Neither the Petitioner nor his parents had consented to the high school's release of the Petitioner's school papers to the police, and the police department had not subpoenaed or obtained a warrant for the papers.

The Parents and Petitioner has no knowledge that there was a search of his papers or that they were turned over to the district attorney's office until Petitioner was arrested on the charges.

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW MISINTERPRETED DECISIONS OF THIS COURT IN HOLDING THAT A PUBLIC HIGH SCHOOL STUDENT DOES NOT HAVE AN EXPECTATION OF PRIVACY IN HIS HANDWRITING AND STUDENT RECORDS THAT PRECLUDES THEIR DISCLOSURE TO LAW ENFORCEMENT OFFICIALS ACTING WITHOUT A WARRANT

This Court recognized in *Roe v. Wade* that a constitutional "right of privacy . . . [is] founded in the Fourteenth Amendment's concept of personal liberty." 410 U.S. 113, 153 (1973). Subsequently, the Court noted that one type of constitutionally-protected privacy right "is the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). When read in connection with the protections afforded by the Fourth Amendment, an individual's scope of privacy and freedom from governmental intrusion are indeed broad.

The Fourth Amendment provides that the federal government shall not violate "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." This Court has held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers, *Elkins v. United States*, 364 U.S. 206, 213 (1960), including public school officials. *See New Jersey v. T. L. O.*, 469 U.S. 325, 336-337 (1985).

The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure ordinarily is unreasonable in the absence of an individualized suspicion of wrongdoing. *See Chandler v. Miller*, 520 U.S. 305, 308 (1997). When a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant, although a warrant is not required to establish the reasonableness of all government searches. Indeed, a search unsupported by probable cause can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

This Court has found such "special needs" sometimes exist in the public school context, reasoning that in that environment the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based on probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." *See New Jersey v. T. L. O.*, 469 U.S. 325, 340, 341 (1985). The school search that this Court approved in *T. L. O.*, while not based on probable cause, was based on individualized suspicion of wrongdoing. This Court explicitly acknowledged, however, that "the Fourth Amendment imposes no irreducible requirement of such suspicion." *Id.*, at 342, n.8 *(quoting United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976)).

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental

rights of self-determination — including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians. *See* 59 Am. Jur. 2d, *Parent and Child* § 10 (1987). When parents place minor children in private schools for their education, tradition dictates that the teachers and administrators of those schools stand in loco parentis with respect to the children entrusted to them. According to Blackstone, a parent

> may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

1 W. Blackstone, *Commentaries on the Laws of England*, 441 (1769).

In *T. L. O.*, this Court rejected the notion that public schools, like private schools, exercise only parental power over their students, which is not subject to constitutional constraints. 469 U.S. at 336. This view "is not entirely 'consonant with compulsory education laws,' " *Id.* (*quoting Ingraham v. Wright*, 430 U.S. 651, 662 (1977)). While denying that the State's power over schoolchildren is formally no more than the delegated power of their parents, *T. L. O.* emphasized that the nature of that power is custodial and tutelary, thus permitting a degree of supervision and control that could not be exercised over free adults. This Court observed that "a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." 469 U.S. at 339.

T. L. O. must be read, however, in light of this Court's recent decision in *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281 (2001). In *Ferguson*, positive blood-test results for illegal drugs in pregnant women were turned over to the police by state hospital employees to be used as evidence of the patients' criminal conduct. The objective was to reduce the number of babies who were addicted to cocaine at birth by persuading the new mothers to enroll in treatment programs or, if necessary, to prosecute them. Reversing the convictions of the women who appealed, this Court reasoned:

> While state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients for the specific purpose of incriminating those patients, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.

121 S. Ct. at 1292.

In both *Ferguson* and the case now under consideration, information about possible multiple defendants was turned over to local police departments without first obtaining a search warrant or a knowing waiver from the defendants. In both cases, the actions were taken by state actors. In this case, the court below assumed that the Petitioner "had a reasonable expectation of privacy with respect to his school papers, notwithstanding the fact that he had turned them over to his teachers" (Appx. A, pp. 17a-18a).

Although school authorities have the power and the duty to "inculcate the habits and manners of civility," *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986), children do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). The nature of those rights is what is appropriate for children in school. *See, e.g., Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 693 (1986) ("It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (public school authorities may censor school-sponsored publications, so long as the censorship is "reasonably related to legitimate pedagogical concerns").

The decisions of this Court have made it clear that Fourth Amendment rights, as well as First and Fourteenth Amendment rights, are different in public schools than elsewhere. Nevertheless, the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. *See Vernonia School District 47J v. Acton*, 515 U.S. 646, 657 (1995). In *Vernonia*, the search (drug testing of public-school student athletes) was found not to violate the Fourth and Fourteenth Amendments because it was "undertaken for prophylactic and distinctly nonpunitive purposes (protecting student athletes from injury, and deterring drug use in the student population). . . ." 515 U.S. at 658 n.2.

However, the search of the Petitioner's school papers in this case was undertaken for distinctly *punitive* purposes, namely, to charge criminally whoever may have written the offensive graffiti on the chalkboard and walls of the high

school. Moreover, the search was all the more objectionable in that it implicated the First Amendment rights of the Petitioner. It bears repeating here that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Indeed, students cannot be punished merely for expressing their personal views on the school premises, whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours," 393 U.S. at 512-513, unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students." *Id.* at 509.

While repugnant to all thinking people, tasteless remarks have been scrawled on high school chalkboards and in high school hallways from time immemorial. It is doubtful that anyone having any relationship to this proceeding has not personally witnessed — and promptly ignored — offensive, if not obscene, words and phrases written on school blackboards, in hallways, and on lavatory partitions. Thus, the words in this case were unlikely to "substantially interfere with the work of the school or impinge on the rights of other students," nor have the school authorities even alleged that the offensive words might have done so in this case.

There is no question that a school does not have to tolerate student speech that is inconsistent with its "basic educational mission," *Fraser*, *supra*, at 685, even though the government could not censor similar speech outside the school. In *Fraser*, this Court held that a student could be disciplined for having delivered a speech that was "sexually

explicit" but not legally obscene at an official school assembly, on the theory that the school was entitled to "disassociate itself" from the speech in a manner that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public school education." 478 U.S. at 685-686. This Court went on to state, however, that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," *id.*, at 683, rather than with the federal courts.

In this case, the Petitioner and his parents do not question the authority of the school officials to disassociate themselves from the tasteless and vulgar language that was found on school property. They do not question the right of school officials to discipline the party or parties responsible for such speech. They do contest, however, the right of school authorities, in concert with local law enforcement authorities, to strip the Petitioner or any other student of his or her fundamental constitutional rights, particularly those protected under the First, Fourth, and Fourteenth Amendments, in the name of bringing the malefactor to justice. The offending words did not threaten to "substantially interfere with the work of the school or impinge on the rights of other students" and thus did not justify the refusal of the authorities to observe the constitutional protections afforded the Petitioner in this case.

The words of this Court in *Ferguson* are equally applicable here:

> While state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they

> inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients,* they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.

121 S. Ct. at 1292 (emphasis in the original). In this case, the vice-principal may have had a duty to provide police with evidence of criminal conduct inadvertently acquired in the course of her administrative duties, but she had a special obligation to make sure that the Petitioner and the other suspects were fully informed about their constitutional rights when she acted with the specific purpose of incriminating them in connection with the graffiti.

II.

THIS COURT SHOULD DETERMINE WHETHER A PUBLIC HIGH SCHOOL STUDENT'S RECORDS ARE PROTECTED FROM DISCLOSURE UNDER THE FAMILY EDUCATION RIGHTS AND PRIVACY ACT OF 1974, AN ISSUE OF FIRST IMPRESSION

The plain language of the relevant provision of the Family Education Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g(b)(1), reveals that it is intended to protect the privacy of students and their parents. The sponsors of the amendment to FERPA which added this particular provision stated, "The purpose of the Act is two-fold — to assure parents of students . . . access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without

their consent." 120 Cong. Rec. 39862 (Dec. 13, 1974) (Joint Statement in Explanation of Buckley/Pell Amendment).

FERPA prohibits educational agencies or institutions from maintaining "a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents" to anyone other than statutorily-designated authorities or individuals, which does not include other students. 20 U.S.C. § 1232g(b)(1). The statute defines "education records" as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A).

In the only federal appeals court decision on this issue found to date, the Tenth Circuit recently ruled that the provision of FERPA that provides parents access to their children's education records, § 1232g(a)(4)(B)(1), means that

> a teacher may reveal a grade book to a substitute teacher without being required to also disclose that grade book to a parent; if, however, the teacher reveals the grade book to anyone other than a substitute, the grade book becomes an "education record" to which a parent gains the right to access.

Falvo ex rel. Pletan v. Owasso Independent School District No. I-011, 233 F.3d 1201, 1216 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 2547 (U.S. 2001).

Following this line of reasoning, the Petitioner's school papers and tests in this case are "education records" that cannot be disclosed to outsiders without the permission of the student or his parents. The language of FERPA reveals that "Congress intended for the definition of education records to be broad in scope." *Belanger v. Nashua School District*, 856 F. Supp. 40, 48 (D.N.H. 1994). To be protected by FERPA, a student's school papers need only be "maintained" by an educational institution and contain "information directly related to [the] student." 20 U.S.C. § 1232g(a)(4)(A). Thus, FERPA covers all aspects of a student's educational life that "relate to the medium in which the material is presented." *See Bauer v. Kincaid*, 759 F. Supp. 575, 591 (W.D. Mo. 1991) (holding that FERPA "expressly protects . . . records relating to individual student academic performance").

The legislative history of FERPA indicates that the statute protects from disclosure, in addition to grades and comprehensive test scores, "soft data" that might include untrue or embarrassing information about the student or his parents. *See* 120 Cong. Rec. 13,951-13,953 (1974). "Soft data" that are protected by FERPA include teachers' comments, reports on parent interviews, and student personality profiles. *See* 120 Cong. Rec. 13,953 (1974).

The plain language of the relevant provisions of FERPA make it abundantly clear that the Petitioner's school papers in this case were protected from disclosure and should not have been revealed to law enforcement authorities or made a basis for the criminal prosecution of the Petitioner.

III.

THE COURT BELOW MISINTERPRETED MASSACHUSETTS REGULATIONS IN HOLDING THAT A PUBLIC HIGH SCHOOL STUDENT'S SCHOOL PAPERS ARE NOT "STUDENT RECORDS" THAT ARE ENTITLED TO PROTECTION UNDER THE REGULATIONS' CONFIDENTIALITY PROVISIONS

The Massachusetts Department of Education has promulgated regulations governing the maintenance of records at public elementary and secondary schools. *See* 603 Code Mass. Reg. § 23.00 (1995). These Regulations are intended "to insure parents' and students' rights of confidentiality, inspection, amendment, and destruction of student records and to assist local school systems in adhering to the law." 603 Code Mass. Reg. § 23.01. Although high school students and their parents have free access to their own "student records," third persons generally may obtain access to "student records" only with the written consent of the student or his parents. *See* 603 Code Mass. Reg. § 23.07(4). The school in this case did not obtain the consent of the Petitioner or his parents before disclosing his school papers to law enforcement officials in an attempt to identify the graffiti artist responsible for the offensive scrawlings. Moreover, the law enforcement officials did not obtain a warrant or a subpoena for these items. The Supreme Judicial Court of Massachusetts held, however, that the Petitioner's school papers were not "school records" and thus were not entitled to protection from disclosure. An examination of the relevant regulation casts doubt on this interpretation by the court below.

A "student record" is defined by the Massachusetts regulation as

> the transcript and the temporary record, including all information . . . or any other materials regardless of physical form or characteristics concerning a student that is organized on the basis of the student's name or in a way that such student may be individually identified, and that is kept by the public schools of the Commonwealth.

603 Code Mass. Reg. § 23.02.

The term "transcript" is defined as

> administrative records that constitute the minimum data necessary to reflect information identifying the student (name, date of birth, address, telephone number, names and addresses of parents) and course titles, grades, course credits, grade level completed, and the date of completion.

Id.

A "temporary record" is defined as "all the information in the student record which is not contained in the transcript." *Id.* Items in the temporary record must be "clearly . . . of importance to the educational process," including "standardized test results, class rank (when applicable), extracurricular activities, and evaluations by teachers, counselors, and other school staff." *Id.*

The Petitioner's written assignments and tests should have been considered part of his "student record" because they were "organized on the basis of [his] name or in a way that [he] may be individually identified," and were "kept" by the school while in its possession. *See* 603 Code Mass Reg. § 23.02. The broad definition of "school record" found in the regulations does not expressly exclude homework or classroom tests. The regulations clearly state that they are to be "liberally construed" to insure "parents' and students' rights of confidentiality, inspection, amendment, and destruction of students records." 603 Code Mass. Reg. § 23.01. Therefore, the Petitioner's homework assignments, tests, quizzes, and other written school work were part of his "student record" and should not have been disclosed without his consent or that of his parents.

In short, if the Petitioner's student work was placed in the teacher's student file, then it was "kept" by the school and was entitled to the confidentiality of a "student record." The school officials were not entitled to retrieve these documents and then to disclose this information to law enforcement officials without the express consent of the Petitioner or his parents, which the officials concede they never even requested.

CONCLUSION

The undersigned respectfully requests that this Court grant certiorari in this matter for the reasons stated above.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS DATED AND DECIDED JULY 9, 2001

SUPREME JUDICIAL COURT
OF MASSACHUSETTS

SJC-08270

COMMONWEALTH

vs.

DOMENIC BUCCELLA

November 7, 2000, Argued

July 9, 2001, Decided

* * *

Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, & Sosman, JJ. Marshall, C.J. (concurring in part and dissenting in part).

OPINION

SOSMAN, J. The defendant was charged with violating the civil rights of one of his teachers and two counts of malicious destruction of property over $ 250, all three charges arising out of graffiti on school property that contained obscenities and racial slurs. The evidence identifying the defendant as the perpetrator of these crimes included comparison of the handwriting in the graffiti with the

defendant's handwriting in several of his school work papers. At the request of its handwriting expert, the Commonwealth moved to compel the production of witnessed, comprehensive handwriting exemplars for further comparison. The defendant filed a motion to suppress the handwriting samples provided by his high school and a motion to dismiss, claiming that the evidence used to charge him was illegally obtained. A judge in the District Court denied the Commonwealth's motion for production of exemplars and granted the defendant's motion to suppress and his motion to dismiss. The Commonwealth appealed, and we transferred the case to this court on our own motion. For the following reasons, we reverse and remand the matter for further proceedings.

1. Facts. The defendant was a student at East Bridgewater High School (high school). During the second semester of the 1996-1997 school year, the defendant had refused to work with his special education teacher, Ms. Shirley Phillips, and had engaged in numerous attempts to disrupt her work in the classroom. The defendant's disruptive behavior included racial slurs directed at Ms. Phillips, making "rude guttural sounds whenever she entered the room," and calling her "Tituba," a reference to a black slave in "The Crucible." Despite warnings, reprimands, and a suspension, the defendant's harassment of Ms. Phillips did not abate.

The incidents at issue in the present case occurred during the first two months of the 1997-1998 fall semester. Sometime between the end of the school day on Friday, September 5, 1997, and the start of school on Monday, September 8, 1997, racial slurs were written on the blackboard in Ms. Phillips's classroom. While the defendant's prior racial animosity toward Ms. Phillips made him a potential suspect,

there were many other persons who had had access to the room over the course of the weekend. Photographs were taken and shown to the faculty to determine whether anyone could recognize the handwriting on the blackboard, but no identification was made at that time.

On October 16, 1997, and again on October 23, 1997, the high school was vandalized with obscene words and wavy lines written on the corridor walls. The East Bridgewater police department and the bureau of criminal investigation (BCI) took photographs of the new vandalism. The school's vice principal informed the police that the defendant had been seen by members of the faculty in the corridor at the time of the October 23 incident.

The vice principal investigated the incidents and, on November 3, 1997, she provided the police with statements from other teachers at the school indicating that, for one of the incidents, the defendant was the only student in the vandalized area of the building who was not in his classroom when the vandalism occurred. She also informed the police that she suspected the defendant because, on the day of the October 16 incident, the defendant had been in her office and had spoken the same words that were later written on the walls.

The vice principal provided the police with samples of school work papers written by the defendant, along with "two other student samples,"[1] requesting that the police conduct

1. The judge found that these papers were school assignments and tests provided by the vice principal but the record does not (Cont'd)

a handwriting analysis to determine whether any of the handwriting matched the writing on the walls or the earlier writing on Ms. Phillips's blackboard. The police submitted the samples to an analyst at BCI, who reported the next day that the handwriting in the October 16 and October 23 graffiti matched the defendant's handwriting. Further handwriting analyses were conducted by an independent expert, who confirmed that the defendant was the likely author of the graffiti on the walls and opined that he was also the likely author of the racial slurs on the blackboard. Based on the handwriting analyses, the statements of faculty members, and the defendant's history of offensive behavior directed toward Ms. Phillips, complaints were issued for malicious destruction of property and violation of civil rights.

The defendant filed a motion to suppress the handwriting analyses and samples, claiming that his school papers containing the samples had been illegally obtained by the East Bridgewater police department. Neither the defendant nor his parents had consented to the high school's release of the defendant's school papers to the police, and the police department had not subpoenaed or obtained a warrant for the papers. He also filed a motion to dismiss contending that the evidence used to charge him (*i.e.*, the handwriting comparison) was illegally obtained. The Commonwealth moved for the production of comprehensive handwriting exemplars from the defendant to be taken using the format

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specify from where they were obtained. The record also does not identify who the other two students were or why the vice principal might have suspected them in connection with any of these three incidents.

recommended by its expert. The judge granted the defendant's motion to suppress and motion to dismiss, and denied the Commonwealth's motion for handwriting exemplars.

2. Expectation of privacy. In order to suppress the fruits of an allegedly unlawful search, the defendant must first show that there has been a "search," and, to show that he has been subjected to some form of "search," he must show that the police have intruded on a reasonable expectation of privacy. *See Commonwealth v. Pina*, 406 Mass. 540, 544, 549 N.E.2d 106, *cert. denied*, 498 U.S. 832, 112 L. Ed. 2d 67, 111 S. Ct. 96 (1990); *Commonwealth v. Simmons*, 392 Mass. 45, 49, 466 N.E.2d 85, *cert. denied*, 469 U.S. 861, 83 L. Ed. 2d 128, 105 S. Ct. 196 (1984). The defendant has no expectation of privacy in his handwriting, because "handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice." *United States v. Mara*, 410 U.S. 19, 21, 35 L. Ed. 2d 99, 93 S. Ct. 774 (1973). With regard to school records, we have held that there is no privilege protecting such records from disclosure or restricting the use of such records as evidence at trial. *See Commonwealth v. Beauchemin*, 410 Mass. 181, 185, 571 N.E.2d 395 (1991) (defendant subpoenaed school records of complaining witness; error to exclude records at trial).

To support his claimed expectation of privacy in his school papers, the defendant points to regulations protecting the confidentiality of "student records." Pursuant to G.L. c. 71, § 34D, the Department of Education (department) has

promulgated regulations regarding the maintenance of records at public elementary and secondary schools.[2] *See* 603 Code Mass. Regs. § 23.00 (1995). The purpose of these regulations is "to insure parents' and students' rights of confidentiality, inspection, amendment, and destruction of student records and to assist local school systems in adhering to the law." 603 Code Mass. Regs. § 23.01.

Pursuant to the regulations, high school students and their parents have free access to their own "student records." However, third persons may only access "student records" with written consent from the student or the student's parents, unless one of several exceptions identified in the regulations applies and permits release of the records. 603 Code Mass. Regs. § 23.07(4).[3] Here, the school did not obtain the consent

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2. General Laws c. 71, § 34D, provides in relevant part: "The board of education shall adopt regulations relative to the maintenance, retention, duplication, storage and periodic destruction of student records by the public elementary and secondary schools of the commonwealth." The statute does not set forth any express requirement of confidentiality.

3. Under one such exception, a third party may access "student records" without consent by obtaining a "court order or lawfully issued subpoena," but the school must still make "a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance." 603 Code Mass. Regs. § 23.07(4)(b). The exception is not applicable, as there was no warrant or subpoena issued in this case.

The Commonwealth contends that the school was permitted to release the papers pursuant to an exception allowing a school to

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of the defendant or his parents before disclosing the defendant's papers to the police, nor did the police obtain a warrant or a subpoena for these items. Consequently, if we determine that these assignments are "student records," the release of the papers to a third party would be a violation of the regulations governing such records.

The regulations define the term "student record" as "the transcript and the temporary record, including all information . . . or any other materials regardless of physical form or characteristics concerning a student that is organized on the basis of the student's name or in a way that such student may be individually identified, and that is kept by the public schools of the Commonwealth." 603 Code Mass. Regs. § 23.02. The term "transcript" is defined as "administrative records that constitute the minimum data necessary to reflect the student's educational progress" and is limited to information identifying the student (name, date of birth, address, telephone number, names and addresses of parents) and course titles, grades, course credits, grade level completed, and the date of completion. *Id.* The "temporary record" is defined as "all the information in the student record

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"disclose information regarding a student to appropriate parties in connection with a health or safety emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals." 603 Code Mass. Regs. § 23.07(4)(e). As worded, the exception applies only when there is a threat to the health or safety of persons. The exception would not extend to cases of property damage, and, while the obscenities and racial slurs were profoundly offensive to Ms. Phillips and others, they did not threaten anyone's health or safety.

which is not contained in the transcript." *Id.* Items in the "temporary record" must be "clearly . . . of importance to the educational process," including "standardized test results, class rank (when applicable), extracurricular activities, and evaluations by teachers, counselors, and other school staff." *Id.*

The defendant contends that his written assignments and tests are part of his "student record" because they are "organized on the basis of [his] name or in a way that [he] may be individually identified," and, while in the school's possession, are "kept" by the school. 603 Code Mass. Regs. § 23.02. The defendant also notes that the definition of "student record" is broad, and there is nothing expressly excluding homework or classroom tests from the definition. The defendant invokes the provision that the regulations "should be liberally construed" for the purpose of "insuring parents' and students' rights of confidentiality, inspection, amendment, and destruction of student records." 603 Code Mass. Regs. § 23.01. Thus, the defendant concludes that every one of his homework assignments, tests, quizzes, and other written pieces of school work were part of his "student record" and could not be disclosed without his consent or the consent of his parents.

The defendant's interpretation of the regulations is based on a literal reading of selected phrases from the ambiguous and circular definitions of the terms "student record" and "temporary record."[4] However, looking at the definitions in

4. Where the "student record" consists of "the transcript and the temporary record," and the "temporary record" is defined as "all the information in the student record which is not contained in the transcript," 603 Code Mass. Regs. § 23.02, there is no definition of what, other than the "transcript," comprises a "student record."

their entirety, and in the context of the regulatory scheme as a whole, we are not persuaded that the department intended the term "student record" to include every piece of written work handed in by a student. First, because homework, tests, class assignments, and the like are not part of the student's "transcript," they can only be part of the "student record" if they are in the "temporary record," which may include such items as "standardized test results, class rank[,] ... extracurricular activities, and evaluations." Homework, class work, quizzes, and classroom tests have nothing in common with the examples listed. We also note that the listed examples are typically maintained in a central file on the student, whereas homework assignments, tests, and quizzes are typically handed in to teachers, graded, and returned to the students. The papers themselves are only briefly in the school's possession; all that is "kept" by the school is the resulting grade.[5]

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5. The dissent suggests that, if student work is sent in to the student's file, it is then "kept" by the school and takes on the confidential characteristics of the "student record." Post at __. The regulations suggest that such materials do not belong in the student's file at all. What is to be kept in the "student record" is the "transcript," which does not include student written work, and the "temporary record," consisting of such items as "standardized test results, class rank (when applicable), extracurricular activities, and evaluations by teachers, counselors, and other school staff," items that have nothing in common with the student's written work. 603 Code Mass. Regs. § 23.02. The "temporary record" is to be reviewed periodically, and items that do not belong there are to be removed. 603 Code Mass. Regs. § 23.06(2). Ultimately, once the student is no longer attending the school, the "temporary record" is to be destroyed, leaving only the "transcript" itself as the entirety of the

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"student record." 603 Code Mass. Regs. § 23.06(3). Under this scheme, it does not appear that a student's own written work is to be sent to the student's file or "kept" by the school at all.

Whether things that are not supposed to be part of the "temporary record" become so if they are inappropriately sent to the student's file may pose an interesting hypothetical under these definitions of "student record" and "temporary record," but classifying everything as part of the "student record" merely because of its placement in the student's file can lead to some absurd results. (For example, if someone puts in a student's file a copy of the program from the school play in which the student starred, or a newspaper clipping concerning that student's activities or achievements, does that publicly distributed program or newspaper article suddenly become confidential merely because it is now located in the student's file?) The dissent's analysis would make the confidentiality of the student's work hinge on where the student paper was located. Post at __. If students have privacy interests in their own written work, those privacy interests should not be greater or lesser depending on whether the written work is in a teacher's briefcase to be handed back the next day or in a file in the principal's office. Given that we are interpreting ambiguous and circular definitions of the terms "student record" and "temporary record" (*see* note 4, *supra*), there is no need to interpret them in a way that would have such puzzling consequences.

To the extent that, as the dissent suggests, the critical issue is whether the written papers in this case were "kept" in the defendant's file, we agree that the defendant produced no evidence on that issue. The defendant, who had the burden of showing that his reasonable expectation of privacy had been invaded by a violation of these regulations, made no showing as to how or from where his writing samples had been retrieved, and thus no showing that they had been "kept" in some central file on him prior to their transmittal to the police.

Moreover, the broad interpretation of the regulations suggested by the defendant would prevent the use of student work for ordinary teaching purposes. A "third party" may not access any "information in or from a student record" without "informed written consent of the eligible student or the parent," 603 Code Mass. Regs. § 23.07(4), and the term "third party" is defined as "any person . . . other than the eligible student, his/her parent, or authorized school personnel." 603 Code Mass. Regs. § 23.02. Because the term "eligible student" is defined as a student who is at least fourteen years old or has entered the ninth grade (603 Code Mass. Regs. § 23.02), students in elementary schools, middle schools, and junior high schools are not "eligible students," and are therefore not allowed to access their own "student records" or consent to the release of any portion of their "student records." If all homework and test papers are part of the "student record," teachers could not even hand corrected or graded assignments back to elementary, middle or junior high school students without written consent from each student's parent. An interpretation of the term "student record" that prevented teachers from reviewing a student's work with the student in question, or even returning papers, quizzes, and tests to the student, would be utterly absurd and is clearly not what the department intended.[6]

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6. Even with regard to older "eligible" students, the regulations would, if interpreted as the defendant suggests, interfere with the ordinary return of assignments to the student. The regulations require that, while a student is enrolled at the school, the school principal "shall periodically review and destroy misleading, outdated, or irrelevant information contained in the temporary record," but must give prior written notice to both the student and the student's parents

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Other standard teaching practices would be forbidden under the defendant's proposed interpretation of "student record." A teacher could not post a student's work on a bulletin board, or read a student's essay aloud in class, without the "specific, informed written consent" of either an "eligible student" or a parent. 603 Code Mass. Regs. § 23.07(4). For younger students in grade levels lower than ninth grade, teachers would have to contact a student's parent to obtain written permission to share the student's work with the rest of the class for educational purposes. Even display of work as a form of recognition, reward, or encouragement would be prohibited unless the parent were first notified and gave written consent. For example, an elementary school art teacher could not display student artwork in the classroom without first obtaining separate written permission from a parent.

Other features of the regulatory requirements pertaining to "student records" would, if applied to routine homework assignments, quizzes, and tests, be absurdly cumbersome. For example, when parents, students, or third parties access a "student record," that access must be recorded in a detailed

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and give them an opportunity to retrieve or copy the material prior to its destruction. 603 Code Mass. Regs. § 23.06(2). School teachers routinely hand homework assignments, tests, and quizzes back to students (and thereby, if they are part of the "temporary record," remove them from the student's "temporary record") without prior written notification to each student's parent. Requiring teachers to notify parents, in writing, every time they are about to return corrected student work to high school students would be as inane as requiring written parental consent before handing student papers back to elementary and junior high school students.

log. 603 Code Mass. Regs. § 23.07(1).[7] It seems reasonable for the school to keep a log of those who access a student's school file, as one can readily maintain a log sheet in the front of the file listing those who have accessed the file. But it would be burdensome in the extreme for each teacher to keep individual logs of access for each homework assignment, test, quiz, and essay for each student. Teachers usually organize their papers by assignment, not by student, *e.g.*, a stack of quizzes or a stack of book reports. If these assignments were included in the "student record," the teacher would have to keep a log of access for each assignment, or keep a general log for each student to be updated when anyone accessed any of a number of stacks of assignments. A teacher would be required to make detailed entry in the log (*see* note 6, *supra*) every time that a student's work was displayed or read aloud, and, for younger students, every time their written work was handed back to them (after obtaining the written consent described above).

Similarly, the regulations require careful entries whenever an item is added to a student's "temporary record." After specifying that information in the student record "shall be limited to information relevant to the educational needs of the student," the regulations go on to require that "information and data added to the temporary record shall include the name, signature, and position of the person who

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7. The detail to be included in the log consists of the name, position, and signature of the person releasing the information; the name, position, and affiliation of the person receiving the information; the date of access; identification of the portions of the record that were released; and the purpose for which access was allowed. 603 Code Mass. Regs. § 23.07(1).

is the source of the information, and the date of entry into the record." 603 Code Mass. Regs. § 23.03. If teachers must treat every student paper as part of the "student record," teachers would have to be making an entry in each student's record every time they collected homework assignments, quizzes, or classroom tests.

In light of the multiple layers of absurd consequences that would result from the defendant's proposed interpretation of "student record" and "temporary record," many of them inimical to ordinary teaching practices, we do not interpret these ambiguous definitions as including homework, written classwork, classroom tests, or quizzes. We do not believe that the department intended to interfere with the normal process of returning corrected and graded work to students or to cripple that process with burdensome paperwork requirements. If the department wishes to protect these items, it may of course do so by appropriate regulation, but the regulations in their current version show no such intent on the part of the department.[8]

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8. The defendant also contends that his papers were protected under the Family Education Rights and Privacy Act of 1974 (FERPA), which imposes requirements on educational institutions receiving Federal funds. 20 U.S.C. § 1232g(a), (b), and (e) (1994). FERPA defines protected "education records" as all records that "contain information directly related to a student" and "are maintained by an educational agency or institution." 20 U.S.C. § 1232g(a)(4)(A). (Unlike the Massachusetts regulations, FERPA contains no definitions of or limitations on what sorts of items may be placed in an "education record," but rather makes any information that is "maintained" concerning a student part of that student's "education record.") The reference to records that are "maintained"

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While we conclude that homework and the like do not come within the definition of "student record," and thus are not protected by the confidentiality provisions of the regulations, we must also consider whether, on any other basis, the defendant would still have a reasonable expectation of privacy in his schoolwork. A student would, even without reference to the regulations, reasonably expect that any written work handed in to a teacher would be used solely for educational purposes, *i.e.*, that the teacher would review, correct, and grade the paper or test and return it to the student.

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by the school suggests that this definition does not include student papers or tests that are only briefly held by a teacher for correction and grading. The defendant has not cited any case that extended the protections of FERPA to a student's written work product. Implicitly, the United States Court of Appeals for the Tenth Circuit is of the view that the papers themselves are not "education records." In *Falvo v. Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1212-1218 (10th Cir. 2000), the court held that the practice of having students grade each other's papers and announce the grades in class violated FERPA because the grades themselves were part of the "education record." In its extended discussion as to why the announced grades were, even prior to their entry in any record, an "education record," the court at no point even suggested that the papers themselves were part of the "education record" or that the practice of having students read each other's papers had violated FERPA. *Id.* Moreover, FERPA is not violated unless a school has a "policy or practice of permitting the release of education records" without parental consent. 20 U.S.C. § 1232g(b)(1). A single instance of releasing a record without parental consent (which is all that is alleged here) is not a violation of FERPA. *See Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp. 2d 664, 674 (D. Minn. 1999) (finding no FERPA violation where plaintiff alleged only one incident of school releasing records without parental consent).

A student would not expect, for example, that a teacher would turn over copies of student homework, papers, tests, or quizzes to the media.

A mere expectation that the person to whom an item is entrusted will use it for limited purposes and not reveal it to others does not give rise to a reasonable expectation of privacy recognized under the Fourth Amendment to the United States Constitution. In *United States v. Miller*, 425 U.S. 435, 48 L. Ed. 2d 71, 96 S. Ct. 1619 (1976), the Court held that the defendant had no reasonable expectation of privacy in his bank records, notwithstanding his expectation that the bank would not disclose such information. "The Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id.* at 443. Relying on Miller, we have held that a defendant had no reasonable expectation of privacy in telephone message records when the taking of those messages had been entrusted to an outside service. *Commonwealth v. Cote*, 407 Mass. 827, 833-836, 556 N.E.2d 45 (1990).[9]

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9. We did recognize that analysis of an expectation of privacy following entrustment to a third party might be different under art. 14 of the Massachusetts Declaration of Rights: "It may be that under art. 14 exposure of information to another party might not compel the rejection of a claim of a reasonable expectation of privacy, particularly in light of the fact that the third party here, [the message service], considered the telephone message records to be confidential." *Commonwealth v. Cote*, 407 Mass. 827, 835, 556 N.E.2d 45 (1990). In the present case, the defendant's arguments were based exclusively on the Fourth Amendment, not on art. 14.

Here, we note that the items were turned over to a governmental entity (the public high school), not to a private third party. We also note that school attendance is compulsory, G.L. c. 76, § 1, and that students handing in schoolwork to their teachers are not doing so in a manner that is entirely voluntary.[10] It is unclear whether the principles of *United States v. Miller*, *supra*, would apply when the items are entrusted to a government entity, under some degree of compulsion, for a limited purpose that would not normally entail disclosure to others. It would appear reasonable to expect that a government agency, to which a citizen is required to submit certain materials, will use those materials solely for the purposes intended and not disclose them to others in ways that are unconnected with those intended purposes. Thus, a student may reasonably expect that papers handed in to public school teachers will be used solely for educational purposes and not disclosed outside the educational setting. While holding that school records are not literally privileged (as they may be obtained by means of a mere subpoena), we have nevertheless recognized that there are privacy interests at stake in school records and held that G.L. c. 4, § 7, Twenty-sixth (c), exempts such materials from public disclosure under G.L. c. 66, § 10. *Commonwealth v. Beauchemin*, 410 Mass. 181, 185, 571 N.E.2d 395 (1991). For purposes of this case, we shall thus assume that the defendant had a reasonable expectation of privacy with

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10. The defendant was seventeen years old at the time of these events and was thus no longer required to attend school. *See* G.L. c. 76, § 1, as appearing in St. 1965, c. 572, § 36. *See also* St. 1965, c. 741. However, for most students, attendance is required, and the reasonable expectation as to how school officials will use student papers does not change the moment the student reaches age sixteen.

respect to his school papers, notwithstanding the fact that he had turned them over to his teachers.

3. Reasonableness of the search. Assuming that the defendant had a reasonable expectation of privacy with respect to his written schoolwork while in the school's possession, the school's assembling samples of that work and turning them over to the police would qualify as a form of search. The Fourth Amendment applies to searches by school officials in public schools. *New Jersey v. T.L.O.*, 469 U.S. 325, 333, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985). *Commonwealth v. Snyder*, 413 Mass. 521, 527-528, 597 N.E.2d 1363 (1992). While recognizing that school officials are subject to the Fourth Amendment, courts have also acknowledged the "substantial need of teachers and administrators for freedom to maintain order in the schools." *New Jersey v. T.L.O.*, 469 U.S. at 341, and have thus attempted to balance "the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place." *Id.* at 340. To that end, school officials are not required to obtain a search warrant prior to conducting a search in school.[11] *Id. Commonwealth v. Snyder*, *supra* at 528.

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11. A warrant would be required if school officials conducted a search "explicitly acting on behalf of law enforcement officials." *Commonwealth v. Snyder*, 413 Mass. 521, 528, 597 N.E.2d 1363 (1992). Here, the vice principal conducted her own investigation and volunteered the defendant's handwriting samples. The police did not request that the school provide copies of any suspect's schoolwork.

The Fourth Amendment also does not require that school officials have probable cause prior to a search. Instead, school officials need only act reasonably in all the circumstances. *New Jersey v. T.L.O.*, 469 U.S. at 341. *Commonwealth v. Carey*, 407 Mass. 528, 533, 554 N.E.2d 1199 (1990). School officials need not "meet the standard of probable cause." *Id.* In order to determine whether a search was reasonable, a court must determine (1) whether the "action was justified at its inception," and (2) "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.' " *New Jersey v. T.L.O.*, 469 U.S. 325, 83 L. Ed. 2d 720, 105 S. Ct. 733, quoting *Terry v. Ohio*, 392 U.S. 1, 20, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). A search is justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *New Jersey v. T.L.O.*, 469 U.S. at 342. The standard of reasonable suspicion does not require absolute certainty, but only "sufficient probability," "the sort of 'common-sense conclusion about human behavior' upon which 'practical people' — including government officials — are entitled to rely." *Id.* at 346, quoting *United States v. Cortez*, 449 U.S. 411, 418, 66 L. Ed. 2d 621, 101 S. Ct. 690 (1981). A search is reasonably related in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *New Jersey v. T.L.O.*, *supra* at 342.

The search conducted here easily meets this standard of reasonableness. It was reasonable to suspect the defendant in connection with these crimes, and the inspection of papers

he had turned in to school teachers was a minimal intrusion. Indeed, the only inspection being conducted was of the handwriting characteristics displayed on the papers, not their substantive content or academic merit. Given that there is no reasonable expectation of privacy with respect to handwriting itself, *United States v. Mara*, 410 U.S. 19, 21, 35 L. Ed. 2d 99, 93 S. Ct. 774 (1973), the scope of the inspection was limited to a subject that was not even private, and any observations beyond the characteristics of the handwriting were purely incidental.[12]

Assessment of the reasonableness of the school's conduct here must also recognize that the school itself was the victim of these particular ongoing crimes, and was, like any victim, seeking to assist the police in solving the crimes and preventing further recurrences. While the school may have had some general obligation to use student papers only for educational purposes, it had a clear obligation to prevent further racial harassment of a faculty member and further physical damage to the public school premises. Where a student's school papers likely contained evidence pertinent to ongoing disruptive conduct at the school, it was reasonable of the school to review those papers and submit them for expert evaluation by the police. This search, if it was a search, easily passes muster under the Fourth Amendment requirement of reasonableness.[13]

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12. The substantive contents of the papers did not add to the evidence against the defendant, and they are not even described in any of the police reports.

13. The defendant did not make any claim that the inspection (Cont'd)

4. Handwriting exemplars. The Commonwealth contends that the motion judge erred in denying its motion for further handwriting exemplars. The defendant contends that the motion for handwriting exemplars was properly denied because the exemplars would be fruit of the poisonous tree. The fruit of the poisonous tree doctrine is properly invoked when evidence, although legally obtained, is derived from an illegal source. *See Commonwealth v. Fredette*, 396 Mass. 455, 459, 486 N.E.2d 1112 (1985). As discussed above, there was no illegality in inspecting the handwriting samples, and evidence from those inspections should not have been suppressed. Thus, there is nothing to taint the Commonwealth's obtaining other handwriting exemplars from the defendant. The motion for handwriting exemplars should have been allowed.

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of his papers violated art. 14. We have previously refrained from deciding whether art. 14 imposes a stricter standard for school searches than the reasonableness standard imposed by Fourth Amendment, but have held that art. 14 does not impose on school officials any standard higher than probable cause to conduct a search. *Commonwealth v. Snyder*, 413 Mass. 521, 529, 597 N.E.2d 1363 (1992). Here, where the defendant was the only person who had the opportunity to commit one of the incidents of vandalism, the words used in the graffiti were identical to words spoken by the defendant earlier the same day, and the defendant's prior harassment of Ms. Phillips had included the use of racial slurs, there was probable cause to search the defendant's school papers for purposes of comparing his handwriting to the handwriting on the walls and blackboard. Framing the defendant's claim as a violation of art. 14 would not affect the outcome we reach today.

5. Motion to dismiss. The defendant's motion to dismiss was also premised on the assumption that the handwriting samples and analyses were illegally obtained, and that, without that evidence, the Commonwealth would be unable to proceed with the prosecution. Having ruled that the initial handwriting analyses should not have been suppressed, and that the Commonwealth is entitled to further handwriting exemplars, we conclude that the motion to dismiss should have been denied.

6. Conclusion. The judgments dismissing the complaints are vacated. The case is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

CONCUR BY:
MARSHALL (In Part)

DISSENT BY:
MARSHALL (In Part)

Appendix A

DISSENT:

MARSHALL, C.J. (concurring in part and dissenting in part). I join in the opinion of the court in all respects but one. The court concludes, incorrectly in my judgment, that "homework, written classwork, classroom tests, or quizzes" are never "student records" under 603 Code Mass. Regs. § 23.02 (2000). Ante at __. In my view, a determination whether a student's work product is part of the "student record," and therefore subject to the requirements of G.L. c. 71, § 34D, and its implementing regulations, 603 Code Mass. Regs. § 23.00 (2000), turns initially on whether that work is "kept" by the school and is "organized . . . in a way that such student may be individually identified." 603 Code Mass. Regs. § 23.02. I agree with the court that in this case the defendant may not invoke the protections of the provisions of the statute and regulations. He may not do so because he has made no showing (as he must) that school officials "kept" the school work papers at issue.

Assignments that are submitted by a student, graded by an instructor, and returned to the student serve an evanescent pedagogical purpose: They are not part of the "student record" under the department's regulations because the school does not "keep" them in its files. 603 Code Mass. Regs. § 23.02. On the other hand, a school may retain in its central or other administrative files all nature of student work (in addition to transcripts) that records a student's academic trajectory.[1]

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1. There is nothing in the record to support the court's statement as to what is "typically" maintained by schools in a "central" student file, nor is there any support for the statement that "all that is 'kept' by the school is the resulting grade" (emphasis added). Ante at __.

Appendix A

These materials are part of the "temporary record" if they are "organized . . . in a way that [the] student may be individually identified," are "kept by the public school" and have clear "importance to the educational process."[2] *Id.* In light of the department's instruction that its regulations "to insure parents' and students' rights of confidentiality . . . should be liberally construed," 603 Code Mass. Regs. § 23.01, I cannot subscribe to the court's holding that the Legislature and the department intended to exclude categorically a student's own work from statutory protection simply because in some (or even most) circumstances, that type of material would be returned to the student or shared with other students.

This is not to suggest that all student work that is placed in a school's central or other administrative files automatically becomes part of the "temporary record" because of its location. The regulations establish that the "temporary record" includes only that information, "regardless of physical form," that meets the three previously identified regulatory criteria. 603 Code Mass. Regs. § 23.02. There is no conceivable way that the regulations would

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2. Because student work papers in some circumstances satisfy these three criteria, I do not subscribe to the court's conclusions that student work product has "nothing in common" with the information that the regulations suggest may be included in the "temporary record"; that student papers are "not supposed to be part of the 'temporary record'" under the department's regulatory scheme; or that student papers therefore will be "kept" in a central school file only when they are improperly placed there and school officials neglect to destroy them in the course of periodic file management pursuant to 603 Code Mass. Regs. § 23.06(2). Ante at n.5.

protect from disclosure, for example, newspaper clippings, programs from school plays, ante at n.5, or any other individually identifiable materials that happen to be located in a student's central file, but are not of "importance to the educational process." 603 Code Mass. Regs. § 23.02.

Because the inquiry must be directed initially to whether a student's written work is "kept" in a school's administrative files, there is also no possibility that the statute or regulations will interfere with a teacher's use of that work in the course of "ordinary teaching practices," ante at, nor would there be any "absurdly cumbersome" requirements placed on school officials to log the submission and return of that work. Ante at __. Student work product utilized in the manner the court suggests, ante at __, is plainly not "kept" by the school and therefore may be disclosed without violating the statute or regulations.

It is contrary to the plain language of the regulation to conclude, as the court does, that the protection accorded to certain student information under the regulations should never take into account the location of that information. Ante at n.5. While, as a general proposition, information and materials that meet the regulations' definitional requirements are part of the "student record . . . regardless of where they are located," 603 Code Mass. Regs. § 23.02, the department has made clear that whether certain information is part of the "student record" does turn, in part, on its locus and in what manner it is "kept." For example, the department has provided that the term "student record" does not include "notes, memory aids and other similar information that is maintained in the personal files of a school employee and is

not accessible or revealed to authorized school personnel or any third party" other than the student, a parent, or a substitute of the record's maker (emphasis added). 603 Code Mass. Regs. § 23.04. Such information may become part of the "student record," however, if it is "released to authorized school personnel." *Id.*

For these same reasons, I agree with the court that the definition of "education records" under the Family Educational Rights and Privacy Act of 1974 (FERPA) does not include student papers or tests that are "briefly" held by a teacher for correction and grading. Ante at n.7. I do not agree with the court's suggestion that FERPA protections can never extend to homework, classroom tests and other student work product. *Id.* As a number of courts have observed, the language of the Federal statute reveals that "Congress intended for the definition of education records to be broad in its scope." *Belanger v. Nashua, Sch. Dist.*, 856 F. Supp. 40, 48 (D.N.H. 1994). *See United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1149 (S.D. Ohio 2000). A student's school papers need only be "maintained" by an educational institution and contain "information directly related to [the] student" to garner the protection of the statute. 20 U.S.C. § 1232g(a)(4)(A). Under this broad mandate, FERPA covers all those aspects of a student's educational life that "relate to academic matters or status as a student," regardless of the medium in which the material is presented. 5 J.A. Rapp, Education Law § 13.04[4][a] (2000). *See Bauer v. Kincaid*, 759 F. Supp. 575, 591 (W.D. Mo. 1991) (in accord with its function to protect "educationally related information," FERPA "expressly protects . . . records relating to individual student academic performance").

Appendix A

The legislative history of the Federal statute, on which the Massachusetts statute and regulations are patterned, supports this broad interpretation of "education records." Congress intended to provide expansive protection to all personally identifiable materials that a school "maintains" on a student. Congress's Joint Statement in Explanation of the Buckley/Pell Amendment, 120 Cong. Rec. 39,862 (1974), explains that to "protect [an] individual['s] right to privacy . . . [the] individual should be able to know, review, and challenge all information — with certain limited exceptions — that an institution keeps on him, particularly when the institution may make important decisions affecting his future, or may transmit such personal information to parties outside the institution."[3] The legislative record of FERPA also makes clear that the statute protects from disclosure not just a student's IQ scores and grades but also "soft data" collected by the school that might contain untrue or embarrassing

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3. None of the listed exceptions applies to a student's written work. In summary, FERPA protections do not extend to (1) records of teachers or administrators that are in the possession of the record's maker or a substitute teacher; (2) law enforcement records; (3) employment records; (4) records of medical or psychological treatment; or (5) records that contain only information about an individual after he or she is no longer a student at that agency or institution. 34 C.F.R. § 99.3 (2001). The statute also specifically exempts "directory information," which includes a student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. 20 U.S.C. § 1232g(a)(5)(A). *See* 5 J.A. Rapp, Education Law §§ 13.04[4][b], § 13.04[8][a] (2000).

information about the student or his family.[4] 120 Cong. Rec. 13,951-13,953 (1974). Many student assignments and other student work papers contain personal information and personal expressions. It would plainly contravene the purpose of FERPA to permit an educational institution to disclose to third parties copies of a student's written assignments that have been "maintained" in the student's administrative file.

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4. Teachers' comments, reports on interviews with parents, and student personality rating profiles are cited as examples of "soft data" that fall within the statute's protection. *See* 120 Cong. Rec. 13,953 (1974). *See also* 5 J.A. Rapp, *supra* at § 13.04[4][a].

APPENDIX B — FINDING OF FACT OF THE BROCKTON DISTRICT COURT FOR THE COMMONWEALTH OF MASSACHUSETTS DATED SEPTEMBER 28, 1999

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

DISTRICT COURT DEPARTMENT
BROCKTON DIVISION

COMPLAINT NO: 9815CR2479
9815CR2480
9815CR2481

COMMONWEALTH

vs.

DOMENIC BUCCELLA

FINDING OF FACT

The matter came to be heard on the defendant's motion to suppress. I find fact as follows.

On September 5, 1997 the defendant Domenic Buccella was a student at East Bridgewater High School. The defendant is a special needs student under an accepted Individual Education Plan pursuant to M.G.L. c. 71 and the IDEA 20 USC 1400 form type 502.2 with a profile of ADHD, impulsive Attention Deficit Hyperactivity Disorder, see exhibit I (Comm. Of Mass. Dept. Of Education Individualized Educational Plan (IEP); see exhibit II

Appendix B

East Bridgewater Educational Plan; the defendant because of his disability lacks impulse control and needs constant monitoring of his behavior: by virtue of being covered under an individual education plan pursuant to c.766 and the IDEA, the defendant was thereby covered by section 504 of the rehabilitation act of 1973 and its subsequent amendment effective July 1, 1997.

On September 5, 1997, a suspect wrote racial slurs on the chalkboard of teacher Shirley Phillips' classroom at East Bridgewater High School. Specifically, the suspect wrote "K.K.K. Niggers Suck". School officials reported the incident to Det. Michael Kennedy of the East Bridgewater Police Department on September 8, 1997. There was no named suspect at that time.

On October 16, 1997 more graffiti was painted on the walls at the school. The defendant became a suspect at that time.

On October 23, 1997 the last act of vandalism appeared on the walls. The school department advised the police that the defendant was a suspect.

In November of 1997, Vice Principal Carolyn Cragin provided to Det. Kennedy written statements and samples of the defendant's handwriting. These samples were school assignments and tests submitted to class as part of his educational curriculum. Kennedy turned the handwriting samples over to Assistant District Attorney John Bradley in December of 1997.

Appendix B

The District Attorney's office retained handwriting consultant Nancy McCann, who after analysis of defendant's handwriting, concluded that the defendant's handwriting matched the writings which are the subject of this complaint.

Det. Kennedy, after consulting with the District Attorney's office, made the decision to file complaints against the defendant.

Neither the defendant, a minor, nor his parents gave permission to the School Department to turn over any samples of the defendant's handwriting to the East Bridgewater Police Department or Plymouth County District Attorney's Office.

CONCLUSION

I find that the defendant, a special education student, had an expectation of privacy when submitting his work assignments and tests to the school. Accordingly, the examples submitted to the District Attorney's office from the School Department must be suppressed.

Date: September 28, 1999 s/ David G. Nagle
David G. Nagle, First Justice

APPENDIX C — EXCERPTS FROM TRANSCRIPT OF DECISION OF THE BROCKTON DISTRICT COURT FOR THE COMMONWEALTH OF MASSACHUSETTS DATED DECEMBER 18, 1998

COMMONWEALTH OF MASSACHUSETTS
BROCKTON DISTRICT COURT

Docket #9815CR2479
and #9815CR2481

Plymouth, ss.

COMMONWEALTH

vs.

DOMENIC BUCCELLA

Before: Justice David G. Nagle

Date: December 18, 1998

* * *

[40] Mr. Turner:

Good afternoon your Honor.

Judge:

Good afternoon. I have reviewed the briefs in the matter. I have reviewed both the Commonwealth's brief and the defendant's brief. The issue before the court and Solely the issue before the court here today is whether or not I would allow the Commonwealth to seek further exemplars of the

defendant's handwriting and I accept as facts the, and I believe the Commonwealth accepts as facts the statement of facts of the case is recited on the proof of the defendant, paragraph's 1 – 13. For those being the facts in the case in terms of the evidence that is before the court presently, I would find that the Commonwealth's request for exemplars, and I think both parties can agree on this it would not violate the 5th amendment. There is clear case law that would indicate that the Commonwealth has the right under the 5th amendment that it is not a violation of the 5th amendment to seek exemplars of handwriting. The question that Solely comes before the court here today is whether or not it violates the seeking of the exemplars now violates the 4th amendment. Because as I heard by the defense lawyer the defendant is charged here with violation of civil rights of writing explicit material on the black board and walls of the school of racial nature. The defendant became a suspect and through the District Attorney's office and the East Bridgewater Police Department samples of the defendant's writing was sent to the East Bridgewater police department for analysis. These samples were tests and other writings the defendant did in a school setting. And the question is whether or not the defendant would have a expectation of privacy as to those writings. I've heard the arguments of the lawyers and I find that there is an expectation of privacy. I think the case law is fairly clear about that, that handing over test results or any other writings in a school setting to the police department would violate in my judgement the defendant's rights under the 4th amendment. There is no motion to suppress in front of me and therefore I will not be acting on a question of a motion to suppress. The only question is whether or not now the Commonwealth should have the exemplars because

[41] the case is still in the posture of the defendant being able to file a motion to suppress if the exemplars that were previously supplied were suppressed and the new exemplars then would boot strap the Commonwealth back into the case.

Mr. Turner:

Your Honor, to please the court, by providing my brother counsel with a motion to suppress evidence and a motion to dismiss the case with the appropriate affidavits your Honor and one of the issues was that your Honor brought up last week, Friday, that if we wanted to do this you would be here today with the appropriate documentation your Honor. I would like to approach the bench and provide these documents to his Honor.

Judge:

Mr. Lee, are you in a position to argue this?

Mr. Lee:

I am your Honor.

Judge:

Alright.

Mr. Lee:

(inaudible).

Judge:

I didn't realize that. I would not have jumped gun.

Appendix C

Mr. Turner:

But your Honor one of the things that Mr. Lee and I stipulate is that we believe that his Honor has heard all of the necessary evidence he needs to make a decision on this case has more than enough argument from both my side as well as Mr. Lee's side to rule on these issues appropriately without using up any more valuable court time.

Judge:

You've agreed that?

Mr. Lee:

[42] We've agreed that the court may consider the prior evidentiary hearing, also the police reports that are part of the clerk's file and the facts that were submitted to the court.

Judge:

Okay. Step back and I'll do it. The record it now at that the it will be filed and So documented the motion to suppress, the motion to dismiss the case. On the motion to suppress the evidence my reasoning would be the same, that I believe that it is an expectation of privacy and that therefore the handing over of the samples of the handwriting was impermissible and in violation of his rights and therefore I would suppress them. Which leads me now to the second phase of this hearing as to whether or not the Commonwealth has a right to now seek the exemplars. Frankly, they do have a right to seek the exemplars, the question is whether or not they have the right in this forum to seek the exemplars.

Appendix C

And when I say that, the process in the district court, the issuance of a criminal complaint is not an investigatory tool of the Commonwealth. It is an allegation that is presented and to be tried and proven before the court. The court is not in a position to be an investigatory. If this was a grand jury proceeding, if this was a grand jury proceeding there is no question but that the Commonwealth could have these exemplars in my judgement. But I'm going to rule that it is not part of mandatory discovery within the rules, mandatory discovery is that the Commonwealth is entitled to discover from the defendant any material and relevant physical evidence and documents and I assume that it would be argued by the Commonwealth that this would be relevant and indeed it is. I say that it is done in the nature of an investigation and that is not the purpose of this hearing and of this proceeding. So respectfully I'm going to deny the Commonwealth's request for exemplars. I'm going to allow the motion to suppress the evidence. I'd be inclined, although to dismiss the case without prejudice and allow the Commonwealth that it should proceed to a grand jury proceeding to allow them to do that.

Mr. Lee:

Would you please not my objection to that. My question to the court is (inaudible).

Judge:

[43] I can't tell you that because I'm not going to rule on that. I would dismiss the case without prejudice. I would suppress the evidence and that is gone. That is not Something you can bring back here. But as pointed out by counsel there

was no warrant issued before complaints were Sought. No warrant to get his exemplars, which I think the Commonwealth could have done. Or bring the matter before a grand jury as an investigatory tool and get those exemplars. So I'd be inclined to dismiss the case without prejudice, which I think I would do. Let me add one thing further, I would allow the exemplars beyond the suppressed evidence if there was other evidence that would support the complaint, but based upon the facts I would say that there wasn't any. And that would be my basis of my ruling on a motion to dismiss without prejudice. So that is it.

Mr. Turner:

Thank you. Quick question. Do we get written rulings on this?

Judge:

Only if you request them. If the Commonwealth wishes to have written rulings I will do that.

Mr. Lee:

I would appreciate that your Honor.

Judge:

Okay.

End of tape.

* * * *

APPENDIX D — CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATIONS INVOLVED

U.S. Const., Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched and the persons of things to be seized.

U.S. Const., Amend. XIV, § 1

[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

* * *

Appendix D

The Family Education Rights and Privacy Act, 20 U.S.C. § 1232g

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

* * *

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which —

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include —

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary

thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of post-secondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or

paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

* * *

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of Federally-supported education programs; recordkeeping.

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following —

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically

allowed to be reported or disclosed pursuant to State statute adopted —

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if —

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior

written consent of the parent of the student.[;]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1986 [26 U.S.C. § 152];

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

Appendix D

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

* * *

Appendix D

63 Code Mass. Reg. § 23.01

23.01: Application of Rights

603 CMR 23.00 is promulgated to insure parents' and students' rights of confidentiality, inspection, amendment, and destruction of student records and to assist local school systems in adhering to the law. 603 CMR 23.00 should be liberally construed for these purposes.

(1) These rights shall be the rights of the student upon reaching 14 years of age or upon entering the ninth grade, whichever comes first. If a student is under the age of 14 and has not yet entered the ninth grade, these rights shall belong to the student's parent.

(2) If a student is from 14 through 17 years of age or has entered the ninth grade, both the student and his/her parent, or either one acting alone, shall exercise these rights.

(3) If a student is 18 years of age or older, he/she alone shall exercise these rights, subject to the following. The parent may continue to exercise the rights until expressly limited by such student. Such student may limit the rights and provisions of 603 CMR 23.00 which extend to his/her parent, except the right to inspect the student record, by making such request in writing to the school principal or superintendent of schools who shall honor such request and retain a copy of it in the student record. Pursuant to M.G.L. c. 71, section 34E, the parent of a student may inspect the student record regardless of the student's age.

(4) Notwithstanding 603 CMR 23.01(1) and 23.01(2), nothing shall be construed to mean that a school committee cannot extend the provisions of 603 CMR 23.00 to students under the age of 14 or to students who have not yet entered the ninth grade.

63 Code Mass. Reg. § 23.02

23.02: Definition of Terms

The various terms as used in 603 CMR 23.00 are defined below:

Access shall mean inspection or copying of a student record, in whole or in part.

Authorized school personnel shall consist of three groups:

(a) School administrators, teachers, counselors and other professionals who are employed by the school committee or who are providing services to the student under an agreement between the school committee and a service provider, and who are working directly with the student in an administrative, teaching counseling, and/or diagnostic capacity. Any such personnel who are not employed directly by the school committee shall have access only to the student record information that is required for them to perform their duties.

(b) Administrative office staff and clerical personnel, including operators of data processing

equipment or equipment that produces microfilm/ microfiche, who are either employed by the school committee or are employed under a school committee service contract, and whose duties require them to have access to student records for purposes of processing information for the student record. Such personnel shall have access only to the student record information that is required for them to perform their duties.

(c) The Evaluation Team which evaluates a student.

Eligible student shall mean any student who is 14 years of age or older or who has entered 9th grade, unless the school committee acting pursuant to 603 CMR 23.01(4) extends the rights and provisions of 603 CMR 23.00 to students under the age of 14 or to students who have not yet entered 9th grade.

Evaluation Team shall mean the team which evaluates school-age children pursuant to M.G.L. c. 71B (St. 1972, c. 766) and 603 CMR 28.00.

Parent shall mean a student's father or mother, or guardian, or person or agency legally authorized to act on behalf of the child in place of or in conjunction with the father, mother, or guardian. The term as used in 603 CMR 23.00 shall include a divorced or separated parent, subject to any written agreement between parents or court order governing the rights of such a parent that is brought to the attention of the school principal.

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Release shall mean the oral or written disclosure, in whole or in part, of information in a student record.

School-age child with special needs shall have the same definition as that given in M.G.L. c. 71B (St. 1972, c. 766) and 603 CMR 28.00.

School committee shall include a school committee, a board of trustees of a charter school, a board of trustees of a vocational-technical school, a board of directors of an educational collaborative and the governing body of an M.G.L. c. 71B (Chapter 766) approved private school.

Student shall mean any person enrolled or formerly enrolled in a public elementary or secondary school or any person age three or older about whom a school committee maintains information. The term as used in 603 CMR 23.00 shall not include a person about whom a school committee maintains information relative only to that person's employment by the school committee.

The student record shall consist of the transcript and the temporary record, including all information recording and computer tapes, microfilm, microfiche, or any other materials regardless of physical form or characteristics concerning a student that is organized on the basis of the student's name or in a way that such student may be individually identified, and that is kept by the public schools of the Commonwealth. The term as used in 603 CMR 23.00 shall mean all such information and materials regardless of where they are located, except for the information and materials specifically exempted by 603 CMR 23.04.

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The temporary record shall consist of all the information in the student record which is not contained in the transcript. This information clearly shall be of importance to the educational process. Such information may include standardized test results, class rank (when applicable), extracurricular activities, and evaluations by teachers, counselors, and other school staff.

Third party shall mean any person or private or public agency, authority, or organization other than the eligible student, his/her parent, or authorized school personnel.

The transcript shall contain administrative records that constitute the minimum data necessary to reflect the student's educational progress and to operate the educational system. These data shall be limited to the name, address, and phone number of the student; his/ her birthdate; name, address, and phone number of the parent or guardian; course titles, grades (or the equivalent when grades are not applicable), course credit, grade level completed, and the year completed.

63 Code Mass. Reg. § 23.07(4)

23.07: Access to Student Records

* * *

(4) Access of Third Parties. Except for the provisions of 603 CMR 23.07(4)(a) through 23.07(4)(h), no third party shall have access to information in or from a student record without the specific, informed written consent of the eligible student or the parent. When granting consent, the eligible

student or parent shall have the right to designate which parts of the student record shall be released to the third party. A copy of such consent shall be retained by the eligible student or parent and a duplicate placed in the temporary record. Except for information described in 603 CMR 23.07(4)(a), personally identifiable information from a student record shall only be released to a third party on the condition that he/she will not permit any other third party to have access to such information without the written consent of the eligible student or parent.

(a) A school may release a student's name, address, telephone listing, date and place of birth, major field of study, dates of attendance, weight and height of members of athletic teams, class, participation in officially recognized activities and sports, degrees, honors and awards, and post-high school plans without the consent of the eligible student or parent; provided that the school gives public notice of the types of information it may release under 603 CMR 23.07 and allows eligible students and parents a reasonable time after such notice to request that this information not be released without the prior consent of the eligible student or parent. Such notice may be included in the routine information letter required under 603 CMR 23.10.

(b) Upon receipt of a court order or lawfully issued subpoena the school shall comply, provided that the school makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance.

(c) A school may release information regarding a student upon receipt of a request from the Department of Social Services, a probation officer, a justice of any court, or the Department of Youth Services under the provisions of M.G.L. c. 119, sections 51B, 57, 69 and 69A respectively.

(d) Federal, state and local education officials, and their authorized agents shall have access to student records as necessary in connection with the audit, evaluation or enforcement of federal and state education laws, or programs; provided that except when collection of personally identifiable data is specifically authorized by law, any data collected by such officials shall be protected so that parties other than such officials and their authorized agents cannot personally identify such students and their parents; and such personally identifiable data shall be destroyed when no longer needed for the audit, evaluation or enforcement of federal and state education laws.

(e) A school may disclose information regarding a student to appropriate parties in connection with a health or safety emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. This includes, but is not limited to, disclosures to the local police department and the Department of Social Services under the provisions of M.G.L. c. 71, section 37L and M.G.L. c. 119, section 51A.

(f) Upon notification by law enforcement authorities that a student, or former student, has been reported missing, a mark shall be placed in the student record of such student. The school shall report any request concerning the records of the such child to the appropriate law enforcement authority pursuant to the provisions of M.G.L. c. 22A, section 9.

(g) Authorized school personnel of the school to which a student seeks or intends to transfer may have access to such student's record without the consent of the eligible student or parent, provided that the school the student is leaving, or has left, gives notice that it forwards student records to schools in which the student seeks or intends to enroll. Such notice may be included in the routine information letter required under 603 CMR 23.10.

(h) School health personnel and local and state health department personnel shall have access to student health records, including but not limited to immunization records, when such access is required in the performance of official duties, without the consent of the eligible student or parent.

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